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Supreme Court of the United States

October Term, 1936

No. 355

HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY and W. M. FRANCIS,

Appellants,

vs.

WILLIAM B. HARRISON, INSURANCE COMMISSIONER,

Appellee.

BRIEF FOR APPELLANTS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1936

HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY AND W. M. FRANCIS, *Appellants*, vs. WILLIAM B. HARRISON, INSURANCE COMMISSIONER, *Appellee.*	No. 355

BRIEF FOR APPELLANTS

The decision of the Supreme Court of the State of Georgia now before this Court for review has not yet been officially reported.

Appellants have made the statement of jurisdiction required by Paragraph 1 of Rule 12.

STATEMENT OF CASE

This case involves the constitutionality of a portion of an Act of the General Assembly of the State of Georgia, approved March 26, 1935, published in *Georgia Laws* 1935, *p.* 139. The statute is printed as an appendix to this brief. The

particular part of the statute attacked as unconstitutional is that part of Section 1 quoted as follows:

> "No licensed fire or casualty insurance company or company writing fidelity or surety bonds, shall write or issue any policy or indemnity contract on any risk in this State except through a resident agent licensed by the insurance commissioner. * * * The words 'resident agent' as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally, and shall not include any salaried employee of any insurance company doing business in this State; but shall include any agents of mutual insurance companies, however compensated."

The present suit does not attack the right of the State to require a licensed resident agent where policies of insurance are written in the State. It does attack the statute as in violation of the Fourteenth Amendment of the Constitution of the United States, in so far as it prohibits agents working on salaries for stock companies from acting as resident agents and being licensed as such. The issue arises in this way:

The Hartford Steam Boiler Inspection and Insurance Company and W. M. Francis, jointly, brought a suit for mandamus against William B. Harrison, Insurance Commissioner of the State of Georgia, to require the Insurance Commissioner to issue to Francis a license to act as resident agent for the Company. The petition for mandamus set out that the Company was duly authorized to issue insurance policies in Georgia, and had made an application to the Insurance Commissioner for a license for Francis to act as its resident agent. (R. p. 1). The application is in accordance with the procedure required by the *Act of* 1935. The petition set out that Francis was a salaried employee of the Company and that the Insurance Commissioner had refused him a license solely because of the fact that he was a salaried employee instead of being an agent working on commissions. The suit for mandamus thereupon set out the attack on the constitutionality of the Georgia statute in the respect heretofore

indicated (R. p. 2.) The grounds of attack will be stated later.

In answer to the mandamus nisi the Insurance Commissioner replied that it was correct that he had refused the license to Francis solely because Francis was compensated as an agent by salary instead of by commission. (R. p. 7 admitting par. 6 of petition R. p 2). The answer expressed the complete satisfaction of the Insurance Commissioner with respect to Francis' ability, training, etc., and his complete suitability to act as resident agent, except for the fact that he was a salaried employee. The answer then denied that the act was unconstitutional for any reason. The pleadings thus made the case turn exclusively upon whether or not the attack on the constitutionality of the statute was well founded.

The trial court held the act unconstitutional and issued the mandamus. (R. p. 12). Upon appeal the Supreme Court of the State of Georgia reversed the judgment of the trial court (R. p. 16), two Justices dissenting. The judgment of reversal in effect directs the trial court to deny the relief prayed for and left nothing open to it except the ministerial duty of carrying out the mandate. In this situation an appeal was allowed to this Court.

SPECIFICATION OF ASSIGNED ERRORS TO BE URGED

The assignments of error present two grounds why the Georgia statute, in the respect heretofore pointed out, is violative of the Constitution of the United States. (R. p. 51.) They may be stated as follows:

(1) The provision prohibiting salaried agents from acting as resident agents is arbitrary and capricious and bears no reasonable relationship to the public health, morals, welfare, or any other matter included within the familiar term "police power." Hence, it deprives both the company and the agent of property and liberty without due process of law, in viola-

tion of the Fourteenth Amendment of the Federal Constitution.

(2) In so far as the act discriminates against stock companies and their agents, and in favor of mutual companies and their agents, in the above requirement, it is likewise arbitrary and capricious and presents a classification bearing no reasonable relationship to the subject matter of the legislation. Hence, it violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution.

The two positions will be discussed separately under the general heading of—

1. "Due Process."
2. "Equal Protection Clause."

DUE PROCESS

Summary of Argument

1. The State cannot arbitrarily interfere with private business or impose unreasonable and unnecessary restrictions upon it. The State cannot arbitrarily abridge the liberty of the individual agent to contract to work with the security of a salary basis. Legislation imposing such restrictions, and abridging the liberty of contract, must have both a real and substantial relation to the public health, safety, morals, or some phase of the general welfare.

Liggett v. Baldridge, 278 *U. S.* 105.
Adair v. United States, 208 *U. S.* 161.
Coppage v. Kansas, 236 *U. S.* 1.
Adkins v. Children's Hospital, 261 *U. S.* 525.
Morehead v. Tipaldo, 56 *S. Ct.* 918 (not yet published in official reporter).

2. That insurance is a business affected with a public interest does not justify arbitrary and unreasonable restrictions on the relation between the company and its agents, or the method of paying compensation to such agents. The restric-

tions, to be valid, must bear some real and substantial relationship to matters within the domain of the socalled police power.

Norfolk & Western Ry. v. Public Service Com., 265 *U. S.* 70.
Burns Baking Co. v. Bryan, 264 *U. S.* 504.
Wolff Packing Co. v. Court of Industrial Relations, 262 *U. S.* 522.
Wolff Packing Co. v. Court of Industrial Relations, 267 *U. S.* 552.

3. Even where legislation is an exercise of the police power in the interests of the public generally, as distinguished from those of a particular class, it is a further constitutional requirement for its validity that the means are reasonably adapted to the accomplishment of the purpose. Arbitrary, unnecessary, and unreasonable, restrictions are void.

Lawton v. Steele, 152 *U. S.* 133.
Yu Cong Eng v. Trinidad, 271 *U. S.* 500.
(See cases reviewed pp. 525, et seq.)

4. The prohibition in the present statute against the use by a stock company, as a resident agent, of any one employed on a salary basis (and against any employee of a stock company being allowed to contract to act as resident agent on a salary basis, and being licensed as such) is purely arbitrary, and bears no reasonable relationship to any matter within the police power.

5. The attempt of the counsel for the appellee to find some connection between this restriction and the public welfare does not succeed.

6. The justification of the restriction in the statute asserted by the Supreme Court of Georgia cannot be sustained.

7. Certain State cases dealing with arbitrary restrictions made by statute as to the relationship between insurance com-

panies and their agents strongly support the view asserted by the appellant.

Hauser v. North British Ins. Co., 206 *N. Y.* 455, 100 *N. E.* 52.
Franklin Fire Ins. Co. v. Montoya, et al, 32 *N. Mex.* 88, 251 *Pac.* 390.
Northwestern Ins. Co. v. Fishback, 130 *Wash.* 490, 228 *Pac.* 516, 36 *A.L.R.* 1507.

8. The Georgia act does not serve any real public interest, but is intended to serve only to give a monopoly to agents working on commissions. This is not within the police power.

People v. Ringe, 197 *N. Y.* 143, 90 *N. E.* 451.
Hauser v. North British Ins. Co., supra.
People v. Gillson, 109 *N. Y.* 389, 17 *N. E.* 343.
Franklin Fire Ins. Co., v. Montoya, et al, supra.

I

Constitutional Right to Be Protected from Arbitrary Interference With Private Business or Liberty to Contract.

The principles to be applied in determining whether any restrictive legislation is legitimately within the police power or goes beyond the same and amounts to a denial of due process of law are now definitely settled by the decisions cited in paragraph one of the foregoing summary. There are, of course, presumptions in favor of the validity of all legislation. The Court will not lightly interfere and declare an act void. Nevertheless, if upon a careful consideration the Court is forced to the conclusion that the restriction set up in the statute is arbitrary and capricious and bears no reasonable relationship to the public health, morals, or welfare, then the statute must yield to the fundamental right of property and liberty guaranteed by the Federal Constitution.

From the standpoint of the Company the following statement is in point:

"The business of a foreign corporation is property, and the corporation a 'person,' within the meaning of the due process and equal protection clauses of the Fourteenth Amendment.

" * * *

"A State cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'

" * * *

"The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. * * *"

Liggett Co. v. Baldridge, 278 *U. S.* 105.
Also, see cases cited in opinion.

From the standpoint of the agent, the right to earn a living in a lawful occupation, and to make his own contracts therefor, is a constitutional right and cannot be arbitrarily or unreasonably restricted under the guise of police power.

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. * * *"

Adair v. United States, 208 *U. S.* 161.

"Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of

personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

"An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State."

Coppage v. Kansas, 236 *U. S.* 1.

"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. * * *"

Adkins v. Children's Hospital, 261 *U. S.* 525.

Another case to be noted here is *Morehead v. Tipaldo*, 56 S. Ct. 918, in which the Court held invalid a law respecting minimum wages for women in New York.

2

Business Affected With a Public Interest Not Subject to Arbitrary and Unreasonable Restrictions.

It is true that insurance is a business affected with a public interest, but this does not justify arbitrary and unreasonable restrictions. The applicable principle in the decision of the

Supreme Court in the case of *Norfolk & Western Ry. v. Public Service Commission*, 265 U. S. 70, is stated with reference to railroads (and is equally applicable to other companies affected with a public interest) in the following language, at page 74:

> "The State in the exercise of its police power, directly or through an authorized commission, may require railroad carriers to provide reasonably adequate and suitable facilities for the convenience of the communities served by them. But its power to regulate is not unlimited. It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business. *Mississippi Railroad Commission v. Mobile & Ohio R. R. Co.*, 244 U. S. 388, 390, 391. The validity of regulatory measures may be challenged on the ground that they transgress the Constitution; and thereupon it becomes the duty of the Court, in the light of the facts in the case, to determine whether the regulation is reasonable and valid or essentially unreasonable, arbitrary, and void. *Wisconsin, Minnesota & Pacific R. R. v. Jacobson*, 179 U. S. 287, 297, 301; *Burns Baking Co. v. Bryan*, 264 U. S. 504. * * * "

In the case of *Burns Baking Co. v. Bryan*, 264 U. S. 504, at page 513, the Court says:

> "Undoubtedly the police power of the State may be exerted to protect purchasers from imposition by sale of short weight loaves. *Schmidinger v. Chicago*, 226 U. S. 578, 588. Many laws have been passed for that purpose. But a State may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them. *Lawton v. Steele*, 152 U. S. 133, 137; *Meyer v. Nebraska*, 262 U. S. 390, 399. Constitutional protection having been invoked, it is the duty of the court to determine whether the challenged provision has reasonable relation to the

protection of purchasers of bread against fraud by short weights and really tends to accomplish the purpose for which it was enacted. * * * "

Wolff Packing Co. v. Court of Industrial Relations, 262 *U. S.* 522, *and Wolff Packing Co. v. Court of Industrial Relations*, 267 *U. S.* 552, are cases of importance at this point. Both cases dealt with a Kansas statute requiring compulsory arbitration of labor disputes. The first case held this unconstitutional as applied to a dispute over minimum wages. The second made the same holding as to a dispute over hours of labor. Both cases were unanimous decisions and rest on the fundamental constitutional right of companies and adult individuals to make their own contracts with respect to compensation for labor and services. The importance of the decisions as bearing on the present case grows out of the following:

The plaintiff was a meat packing company and it was argued that the meat packing industry had become so vital to the public that the business had become within the category of businesses affected with a public interest. The court recognized this to be true, but denied that this justified legislation forcing a company to agree to a certain schedule of pay. The Chief Justice analyzes the situation with respect to businesses affected with a public interest on *pages* 535 *et seq. of the report in* 262 *U. S.* Such businesses he states, fall into three categories, (1) those exercising a public grant of privileges, such as railroads and the like; (2) those which as a matter of legal history have been so classified, such as innkeepers, cab drivers, and certain other industries; and (3) "businesses which though not public at their inception may be fairly said to have risen to be such, and have become subject in consequence to some governmental regulation." He puts meat packing in the third class. He also places insurance in this third class, since he cites as one of the cases in the third class *German Alliance Ins. Co. v. Lewis*, 233 *U. S.* 389. The Court rules with respect to businesses in the third class (which as just pointed out includes insurance) that

the fact that the business is somewhat affected with a public interest does not authorize the State to fix the pay of employees, and that the effort to do so infringes constitutional rights.

3

Means Adopted by Legislation Must Not Be Arbitrary and Unreasonable.

In *Lawton v. Steele, supra,* this Court said:

> "To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

The foregoing is quoted with approval in *Yu Cong Eng v. Trinidad,* 271 *U. S.* 500, *on p.* 525. On the next two pages the Court reviews certain other cases to the same effect. The principle to be followed is definitely settled. Even where the asserted end of the legislation is within the police power it is still a further requirement that the means adopted must have some reasonable relation to that end. It is "established doctrine" that the liberty guaranteed by the Federal Constitution "may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."

Meyer v. Nebraska, 262 *U. S.* 390.

Georgia Statute Arbitrary and Without Reasonable Relation to Any Purpose Within Competency of State.

This is the crux of the case.

There can be no doubt that the principles of constitutional law heretofore set out are settled, and are the basis on which the case must be decided. Even in cases where this Court has divided the difference of opinion has not been with respect to the applicable principle, but has been as to whether the particular statute violated the principle. In each case, when this challenge is made, the final determination of the court must be on whether the particular state law is or is not arbitrary, and does or does not bear some reasonable relationship to a subject within the competency of the State to legislate.

The question is adequately presented by the provisions of the statute itself, in the light of those matters so familiar as to be within the judicial cognizance. No complicated economic or sociological facts are here involved. Where the arbitrary and capricious character of a statutory regulation can be shown from the regulation itself, in the light of general knowledge of the business in question, then no factual inquiry is necessary, but the statute will be held invalid without taking proof. (For example, see *Smith v. Cahoon*, 283 *U. S.* 553.) The Supreme Court of the State of Georgia was correct in assuming that it had adequate information on which to determine the question. We insist, however, that the determination of the majority of that court was not correct.

It is important to have the full statutory scheme in mind. The following features of the act are to be noted:

(1) No licensed insurance companies of the kinds covered by the act shall issue any policy on a risk in Georgia except through a resident agent licensed by the Insurance Commissioner. Sec. 1, first paragraph.

(2) The Insurance Commissioner must examine all agents to ascertain that they possess the moral and financial standing, and that they have knowledge of the business, law, and practices necessary to qualify them and to meet the requirements of the act. Sec. 1, second paragraph.

(3) Provision is made requiring the resident agents to keep records of insurance written, and if required by the Commissioner to furnish him a certified statement of such other information as may be required by the Commissioner to aid in the collection of all premium taxes in this State. Sec. 1, first paragraph.

(4) No salaried agent of a stock company shall act as resident agent. Sec. 1, first paragraph.

(5) But mutual companies may use salaried agents as resident agents. Sec. 1, first paragraph.

(6) The full normal commission shall be paid to the resident agent, but he may divide, to the extent of not over fifty per cent, with another licensed agent on business originated by such other licensed agent if a non-resident of the State. Sec. 1, first paragraph.

(7) No contract bond shall be issued by any surety company except through a resident agent in the county in which the work is located, if the company has an agent resident in that county. Sec. 1, first paragraph.

It is equally important to bear in mind that the provision of the statute now under attack is in no sense a provision regulating the amount of compensation to be paid to agents for writing insurance. The provision requires all agents to be paid by commissions, but makes no limit on the amount of commissions which may be paid them. It prohibits all agents from being paid by salaries without the slightest regard to how reasonable the salaries might be. It has, therefore, no relation to any effort on the part of the State to prevent excessive expenditures by insurance companies as agency costs.

What has just been said completely distinguishes this case from *O'Gorman v. Hartford Fire Ins. Co.*, 282 *U. S.* 251, on which opposing counsel place their chief reliance. The O'Gorman case marks the furthest this Court has ever gone in upholding legislative restrictions in this field. That it is a border line case is conclusively shown by the fact that the Court divided five to four. The question presented in the O'Gorman case was a statute limiting the amount of commissions which could be paid. It may be admitted that there is some remote connection between excessive disbursements for agents' commissions and the rates which insurance companies must charge. Inasmuch as the State undoubtedly has the right to regulate insurance charges the majority of the Court felt that a limitation against excessive agency costs was a means reasonably adapted to accomplish this end. If the Georgia statute now before the Court were a statute to prevent excessive agency costs and the means were reasonably adapted to accomplishing that end, then the ruling of the majority of the Court in the O'Gorman case would be relevant. As pointed out, however, the present statute has no such purpose or effect. The size of the commissions and the size of the salaries are all completely irrelevant so far as the present statute is concerned.

We here summarize the situation: Georgia, like every other state, requires insurance companies to be licensed, after adequate examination, etc., before any of them may write insurance in the State.[1] The present statute contains full provision for the examination of all agents before any agent may be licensed to act as a resident agent. It contains full provision for requiring agents to keep records and make required reports. It sets up no upward limitation on the amount that may be paid for commissions for writing insurance or salaries of agents who are used, in whole or in part, to write insurance. But it does contain the unqualified

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1. Ga. Code 1933, Title 56, Ch. 4, gives in detail the provisions for examining and licensing insurance companies to do business in the State.

prohibition against a salaried agent of a stock company acting for that company as its resident agent.

Such a restriction is an arbitrary interference with the right of the company to conduct its business. Whether an insurance company pays its resident agents by commissions or by salaries (or some one way and some another) does not relate to the public health, morals, welfare, or anything within the domain of the so-called police power.

We stress the fact that the present statute infringes not only the rights of the companies but also the rights of individuals who desire to contract to act as resident agents on a salary basis. The fundamental right of an individual to earn a living, free of arbitrary and capricious restrictions, is the very essence of constitutional liberty. We are not here concerned with those cases where it is claimed that a class, because of economic pressure, needs to be protected from contracting away its rights for an inadequate consideration. The conflicting views on this question are, of course, familiar, but no such problem is involved in the case at bar.

From the standpoint of the constitutional right of the agent to contract for a salary, the situation is simply this: If he prefers to have the security and certainty of a salary contract (many men would prefer such security) and the company is willing to give him such a contract, then the agent may assert, as the one who is now an appellant does assert, a constitutional right to sell his services on this basis. To justify a legislative interference therewith there must be shown some real and substantial relation between the agent working on a salary and the public health, morals, or welfare. A fanciful or imaginary connection is not enough.

We conclude this branch of the discussion with an illustration of the practical working of the statute from the standpoint of the company. What has just been said from the agent's standpoint with regard to an agent who desires to make a contract for a secure salary with a company willing to grant it is an adequate illustration from the agent's standpoint.

Let us assume that a salaried agent of an insurance company doing business in the State of Georgia—perhaps a branch manager, or one of his assistants, or the like—negotiates an agreement for a contract of insurance. It is undoubtedly within the judicial cognizance that this does happen. The company has passed all requirements of Georgia law to be licensed in Georgia; the branch manager is capable of passing all the requirements of this statute as to the qualification that an agent should possess; everything is ready for the policy to be issued, and no insurance broker or agent on commissions has had any connection with the matter. Just at this point, however, the restriction in the statute would come into operation. If enforced it would mean that the branch manager, or whatever salaried agent was used, could not issue the policy which he had negotiated. According to the Georgia statute he would be forced at this point to call in an insurance broker, or agent on commissions, to sign or issue the policy, *and would be forced by the terms of the statute to pay the agent on commissions the full normal commission for a transaction with which such agent had had absolutely no connection.*

Since Georgia requires the subject matter of a statute to be stated in its title, this statute might very well have added as a part of its title "to enforce the payment of full commissions to insurance brokers on business with which they have had no connection." This appears to be the real purpose, and certainly the undoubted effect of the portion of the statute under consideration.

5

Attempt of Appellee to Find Connection Between Restriction and Public Welfare Does Not Succeed.

The original answer filed in this case, in dealing with the constitutional questions, devotes most of its space to asserting the difference between stock companies and mutual companies. This bears on the further contention made by us, under the

equal protection clause of the Federal Constitution, to be discussed in a later division of this brief. In so far as the original answer attempts to find a justification for the prohibition against salaried agents of stock companies acting as resident agents, it is on the grounds, (1) that it would aid the State in the collection of its premiums tax to have all agents on a commission basis, and (2) that it would secure as agents men of higher character and ability. (R. p. 9.) These two assertions appear to be set up really as bearing on the same matter of collecting taxes on premiums. The answer asserts that where salaried agents are used to issue policies they are liable to be mere clerks who do not keep records in Georgia, and therefore to force all policies to be issued through commissioned agents in this State would aid the State in collecting its premiums tax, because these latter agents would be more likely to have records in this State. This, the answer says, constituted "the evil at which the General Assembly aimed in the passage of the act now under consideration."

We believe that at the time this answer was filed the able Assistant Attorney General of the State of Georgia, having charge of the defense of the case, must have overlooked the fact that the statute now before the Court itself requires all agents licensed as resident agents to keep just such records as may be needed for the collection of the premiums tax, and to report thereon to the Insurance Commissioner; and that the statute itself gives the Insurance Commissioner plenary powers to examine agents as to their character, competence, education, etc. Hence, no salaried agent could be licensed as a resident agent or retain his license as such, unless he did keep the records referred to, and did demonstrate his fitness in an examination by appropriate State authorities. The discrimination in this statute against salaried agents is that even when these agents comply with the law and keep records, and by State examination are proved to be satisfactory, nevertheless, they cannot act as resident agents if paid by salary.

If these provisions about examining and record-keeping

had not been in the statute it, nevertheless, would have been fanciful to suppose that the method by which a resident agent was paid, whether by commission or salary, had any real and substantial relation to either the competency of the agent or the character of records kept. The aggregate amount of compensation might conceivably have some such remote relation, but that is a matter which in this respect is not dealt with by the statute. The method of payment, however, could not have any such relation. Where, however, the statute has already protected against both of these features by separate and independent provisions which furnish complete protection, and then goes forward and adds this prohibition against salaried agents who meet all the requirements of the statute acting as resident agents, it becomes as arbitrary and unreasonable as any statute ever presented to this Court.

For a valid exercise of the police power it is necessary not only that it be exercised in the interest of the public generally, as distinguished from a particular class, but also that the means adopted shall not be arbitrary and capricious.

The Insurance Commissioner amended his answer in the trial court to set up a third reason why it was contended that this provision against salaried agents acting as resident agents was a reasonable exercise of the police power. (R. p. 10). That reason is about this: Agents on salaries will be interested chiefly, it is said, in the companies that employ them, whereas agents on commissions will be interested largely in the insured from whom they receive the business; and this, it is said, is a reasonable thing to be required in the public interest.

To have any substance counsel's argument here must mean that situations arise where it is important whether agents will be loyal chiefly to the company employing them, or chiefly loyal to the opposite party, and that this statute would tend to prevent the chief loyalty being to the companies for which the agents were acting. If the argument does not mean this it is meaningless. If it does mean this then the

contention really is that it is competent for the legislature to prohibit insurance companies using as resident agents those whose chief loyalty is to the companies they represent. Stated bluntly, the position is shocking. It is even more shocking when we bear in mind that under express statute in Georgia the agent is in law always treated as the agent of the company alone, with all of the consequences this entails. *Code* 1933, 56-501.[2]

The final basis, therefore, on which opposing counsel attempt to justify the statute presents this contention: That the State of Georgia, having provided that the agent must for all purposes be treated in law as the agent of the company alone, may then competently pass another statute to prevent the company employing agents in a way which will secure their undivided loyalty.

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2. "Any person who shall solicit in behalf of any insurance company, or agent of the same, incorporated by the laws of this or any other State or foreign Government, or who shall take or transmit, other than for himself, any application for insurance or any policy of insurance to or from such company or agent of the same, or who shall advertise or otherwise give notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk at any time, or receive or collect or transmit any premium of insurance, or make or forward any diagram of any building or buildings, or do or perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company, other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or in behalf of any such company, whether any of such acts shall be done at the instance or request or by the employment of such insurance company, or of, or by, any broker or other person, shall be held to be the agent of the company for which the act shall be done or the risk shall be taken."

6

Connection Asserted by the Supreme Court of the State of Georgia Between Restriction and Public Welfare Not Well Founded.

The Supreme Court of the State of Georgia appears not to have accepted any of the attempted justifications of this statute asserted by opposing counsel and just considered. That court devotes the major part of its opinion to a presentation of principles of constitutional law which, as abstract principles, we do not dispute. A large part of it is devoted to discussing the difference between stock and mutual companies. When it comes to the specific question of why it is claimed there is a reasonable connection between the prohibition against salaried agents acting as resident agents, and the public welfare, the court deals with the matter very briefly, and assigns only one ground for its position. (R. p. 37). That ground is that the court knows judicially that the agents in most of the small communities in Georgia are on a commission basis, and that there is not enough business there to support agents on a salary basis. Hence, the court says, the statute may be justified because if the company did not employ these agents on a commission basis the communities would be without insurance agents.

This is the only reason assigned by the Supreme Court of the State of Georgia as to why the public welfare is in any way connected with this restriction. The condition with respect to commissioned agents in small communities in the State which the Supreme Court of the State of Georgia knows judicially, and finds satisfactory, was a condition that existed before the *Act of* 1935 was passed. As this condition existed before that act, it is not dependent on the act for its continuation, but would continue to exist if the *Act of* 1935 in this respect were held unconstitutional. Invalidating the act will in no way prevent insurance companies from employing agents on commissions in the small towns. It will merely permit the companies to employ some agents on salaries

where they deem it advisable. The non sequitur in the position of the Supreme Court of the State of Georgia is involved in the implied assumption that if this act were held unconstitutional the companies would be prohibited from employing commissioned agents, which, of course, is not the case.

We have now examined every reason that has been assigned by the State authorities, either the Attorney General and his assistant, or the Supreme Court of the State of Georgia, as to why it is claimed there is any connection whatever between the prohibition against salaried agents acting as resident agents, and the public health, morals, welfare, or any other matter within the so-called police power. It is obvious that the supposed connections prove, upon examination, to be wholly without merit. There is no real and substantial relation between this restriction and the public health, safety, morals, or welfare. Its arbitrary character is apparent on its face; but the lack of any such real and substantial connection with the public welfare is demonstrated by the complete failure of anyone to imagine and suggest any connection that will stand examination.

7

Cases Dealing Specifically With Insurance Agent Statutes.

Hauser v. North British & Mercantile Ins. Co., 206 *N. Y.* 455, 100 *N. E.* 52, holding void a statute restricting insurance brokers' licenses to persons engaged exclusively in that occupation, or as an adjunct to a real estate business. The court says:

> "It is evident from a reading of the provisions of this added section of the insurance law, that it was the purpose of the legislature to confine the business of the insurance agent, or broker, mentioned to those who should make that their principal business, or who should be real estate agents, or brokers. That was made a

condition of the right to pursue the business. We may readily concede that, as a measure regulative of a business pursuit, which, from the extent to which it is carried on, is, presumably, affected with a public interest, the requirement by the legislature of a license would not be an unreasonable exercise of power. That would afford an opportunity for inquiry into antecedents, and fitness of character, and be a reasonable enough precaution in the public interest. But the legislature has prescribed in this statute a condition for the issuance of the license which is a purely arbitrary restriction. There is no good reason, and no public interest can conceivably be subserved, in prohibiting persons from conducting the business of an insurance agent, or broker, in connection with any other lawful business, or occupation, in which they may be engaged. * * * "

Franklin Fire Ins. Co. v. Montoya, et al, 32 *N. M.* 88, 251 *Pac.* 390, holding a statute prohibiting more than one agent with a license in a town to be arbitrary and unconstitutional. The court says:

"* * * It may be conceded for the purposes of this case that constitutional provisions intended to preserve the rights of individual citizens may sometimes be forced to yield to the public welfare. It should first appear, however, that it is the public welfare which is involved, rather than the interests of a favored few."

Northwestern National Ins. Co. v. Fishback, 130 *Wash.* 490, 228 *Pac.* 516, 36 *A. L. R.* 1507, holding a statute limiting the number of agents which an insurance company may appoint in any locality void for similar reasons. The court says:

" * * * We cannot but feel that the legislature had in view no welfare of the public, but that this legislation is an attempt to monopolize the business of writing insurance. * * * "

Further, the court says:

"Authorities might be multiplied until the perusal of them would become exhausting, to the effect that in any of these matters, where the legislature is interfering with lawful business, that the interference must have some fundamentally sound reason back of it. * * * *"

8

The Georgia Act Is Obviously Intended to Serve Solely the Interests of Agents Working on Commissions. Cases Calling Attention to Ulterior Purposes Shown in Statutes.

There is one group that will be served by this Georgia statute, namely, the insurance brokers or agents working on commissions. We have already pointed out in another part of this brief that it will force the payment to them of commissions on business with which they have had no connection. This is apparent merely from a study of the statute itself. There are certain State cases which should be considered briefly in this connection.

These are decisions which, in determining whether statutory restrictions are arbitrary or not, have given weight to the ulterior purpose apparent from the face of the statute; that is to say, to the purpose apparent in the statute by necessary inference, not so much to accomplish anything in behalf of the public welfare, but to handicap and restrain arbitrarily and unnecessarily one class of citizens for the benefit of another class.

People v. Ringe, 197 *N. Y.* 143, 90 *N. E.* 451, dealt with a statute putting certain unreasonable restrictions on those seeking licenses as undertakers. The court says, at *page* 454:

"We cannot refrain from the thought that the act in question was conceived and promulgated in the interests of those then engaged in the undertaking business, and that the relation which the business bears to the general health, morals, and welfare of the state had much less

influence upon its originators than the prospective monopoly that could be exercised with the aid of its provisions."

Hauser v. North British & Mercantile Ins. Co., supra, has already been pointed out. On the point now under consideration the court says:

"* * * As it was intimated below, following the suggestion in *People v. Ringe,* 197 *N. Y.* 143, 90 *N. E.* 451, 27 *L. R. A.* (*N. S.*) 528, 18 *Ann. Cas.* 474, the legislation now in question must have been promoted in the interests of those engaged in the insurance brokerage business, alone, or in connection with a real estate brokerage business, rather than with any view of the public welfare. * * *"

People v. Gillson, 109 *N. Y.* 389, 17 *N. E.* 343, held unconstitutional a statute putting certain unreasonable restrictions on competitive methods in connection with the sale of food. After stating the fundamental right of liberty to earn a living, subject only to restrictions in behalf of the public welfare, the court says, at *page* 345:

"* * * It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited, or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late—a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them, or unfavorably to their competitors, in the commercial, agricultural, manufacturing, or producing fields. * * *"

The same idea is expressed in *Franklin Fire Ins. Co. v. Montoya, supra,* and *Northwestern National Ins. Co. v. Fishback, supra.*

EQUAL PROTECTION CLAUSE

In discriminating against stock companies and their agents in favor of mutual companies and their agents, the statute also violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution. The discussion under this head can be shortened in view of the presentation under the head of Due Process. It will not be necessary to repeat here the analysis of the act which has heretofore been given.

Summary of Argument

1. While classification is not prohibited it must, nevertheless, be reasonable and not arbitrary. Mere difference is not enough; but the difference upon which the classification is based must bear some reasonable relationship to the purposes of the legislation.

Louisville Gas & Elec. Co. vs. Coleman, 277 *U. S.* 32.
Quaker City Cab Co. vs. Pennsylvania, 277 *U. S.* 389.
Royster Guano Co. vs. Virginia, 253 *U. S.* 412.
Air-Way Corp. vs. Day, 266 *U. S.* 71.
Schlesinger vs. Wisconsin, 270 *U. S.* 230.
Gulf Coronado and Santa Fe Ry. vs. Ellis, 165 *U. S.* 150.

2. The difference between stock companies and mutual companies is admitted, and would justify classification for some purposes. It is not, however, a difference which bears any reasonable relationship to the question of how their agents are paid.

1

Classification Must Bear Some Reasonable Relationship to Purpose of Legislation. Mere Difference Not Enough.

An elaborate review of precedent is not necessary. The late decisions of this Court in *Louisville Gas & Electric Co. v. Coleman*, 277 *U. S.* 32, and *Quaker City Cab Co. vs. Penn-*

sylvania, 277 *U. S.* 389, have reviewed the matter fully. We quote from the first of those cases as follows:

> "The classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia,* 253 *U. S.* 412, 415; *Air-Way Corp. v. Day,* 266 *U. S.* 71, 85; *Schlesinger v. Wisconsin,* 270 *U. S.* 230, 240. That is to say, *mere* difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf Coronado and Santa Fe Ry. v. Ellis,* 165 *U. S.* 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

2

Difference Between Stock Companies and Mutual Companies Bears No Relation to How Agents Paid.

Undoubtedly there is a difference between a mutual company and a stock company, but mere difference is not enough.

Admittedly, this difference between the two types of insurance companies is such a difference as may be made the basis of a classification provided always the subject-matter of the legislation is one to which this difference sustains some reasonable relation. Hence there are cases which could be cited that have authorized a classification between stock companies and mutual companies where the regulation of rates of insurance is involved. Obviously, the difference between the two types of companies does bear a relationship to the matter of rate regulation, since in mutual companies the earnings on

high rates are merely pro-rated back to the members who are the same individuals who have paid the rates.

However, these cases, authorizing this classification for this purpose, are in no sense authority for the view that the difference between mutual and stock companies authorizes a classification for all purposes of legislation; and no case can be found which sustains such classification for a purpose similar to that now before the Court.

As stated, we do not repeat the analysis of the statute and the exposition of its purposes, which have heretofore been given under the head of due process. We do ask the Court to bear that discussion in mind at this point because we believe when the purpose of this statute is clearly borne in mind it becomes perfectly obvious not only that the whole matter is unreasonable, as heretofore pointed out, but that there is also no difference between stock companies and mutual companies from this standpoint. The unearned commissions which this statute forces to be paid to commissioned agents on business they have not written in the one instance would come out of the pockets of the stockholders of a stock company; and in the other instance (if it applied to mutual companies) would come out of the policyholders of the mutual companies. We are unable to see why it is reasonable for the legislature to pay unearned commissions at the expense of stockholders, but would be unreasonable for it to pay such commissions at the expense of policyholders. It is an arbitrary confiscation of property interests in either case, and the difference between stock and mutual companies has no relationship to the ends accomplished by the statute.

From the standpoint of the classification between the agents of the two companies, the arbitrary nature of the classification is apparent on its face.

If we take the most charitable view possible of the statute and treat it as merely requiring a certain method of compensating agents, it is not apparent why one method of compensation should be prohibited to stock companies and per-

mitted to mutual companies. The difference in the method required is not only arbitrary, as heretofore pointed out, but, furthermore, the discrimination as between the types of companies and their agents rests on a difference which has no reasonable relationship to the legislative purposes. The lack of such relationship is not susceptible of elaborate argument. It simply does not exist. And when that has been stated the subject has been covered.

No reasonable connection between the difference in the two types of companies, and the method of paying agents, has been pointed out by counsel for the appellee, nor is set out in the opinion of the Supreme Court of the State of Georgia.

Respectfully submitted,

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APPENDIX

Act of General Assembly of Georgia, approved March 28, 1935. Georgia Laws 1935, page 139:

"An Act to amend chapter 56-5, entitled, 'Agents and Solicitors,' of the title 56, 'Insurance,' of the Code of Georgia of 1933. The said section of the Code as hereby amended is Section 56-508, and new sections are to be added to the said Code. The said Code being amended to make the provisions of the same applicable to the business of writing Fidelity and Surety Bonds in this State; to provide for the licensing and examination of Agents for license; to provide for the establishment of Agent's Association; to prevent the writing or acceptance of such insurance contracts and/or bonds issued by non-admitted insurers; to provide penalties, and for the enforcement thereof for the violation of any of the provisions hereof; to provide for the repeal of any law or laws in conflict herewith; and for other purposes.

"Be it enacted by the General Assembly of Georgia, and it is hereby enacted by the authority of the same, that from and after the passage of this Act, chapter 56-5, entitled 'Agents and Solicitors,' of title 56, 'Insurance,' of the Code of Georgia of 1933, is hereby amended as follows:

" 'Section 1. Section 56-508, relating to the licensing of agents by the Insurance Commissioner, is stricken and in lieu thereof there is substituted the following section:

" '56-508. License of Agents by Insurance Commissioner. No licensed fire or casualty insurance company or company writing fidelity or surety bonds, shall write or issue any policy or indemnity contract on any risk in this State except through a resident agent licensed by the Insurance Commissioner: Provided that no contract bond shall be issued by any company, except through an agent, resident of the county in which the work under contract is located, if the company has an agent, resident in the county in question. The full commission thereon (meaning thereby the commission paid for the

production of business by him), shall be paid to such resident agent. Provided, however, that such resident agent may pay a commission on business placed with him by another duly licensed resident agent, and, provided further, that such resident agent may pay a commission not exceeding fifty per centum of the regular commission allowed resident agents upon the issuance of such policies or contracts, to a duly licensed non-resident on any business originated by such non-resident. This section shall not apply to policies covering property in transit while in the custody of any common carrier or to rolling stock of any common carrier, nor to cotton insurance issued under a per bale reporting form of coverage. The words "resident agent" as used in this section are deemed to mean resident agents engaged in the solicitation of such business from the public generally and shall not include any salaried employee of any insurance company doing business in this State; but shall include any agents of mutual insurance companies however compensated. Nothing in this section, however, shall be construed to relieve from license requirements any State or Special Agent, or traveling and/or salaried employee, who performs any of the acts, services or things mentioned in section 56-501 of title 56 Code of Georgia, in behalf of any insurer or agent of the same. Such resident agent shall keep a true record of all policies and/or bonds thus issued through him on business originated by such licensed non-resident and shall furnish, if requested by the Insurance Commissioner, a verified statement showing the risk covered, amount of insurance and premium involved, and such other information as may be required to aid the said Commissioner in the collection of all premium taxes due in this State and the enforcement of the provisions of this Act as amended hereby. No person except as hereinafter provided shall be licensed as an insurance agent except upon the application of a company authorized to do business in this State, which said application shall be accompanied by a certificate signed by an executive officer of such company and certifying that after inquiring into the facts to the best knowledge, judgment and belief of such company, such person is of

good character, is now a bona fide resident of the State of Georgia, and in good faith intends to remain as such resident for a period of twelve (12) months or more from the date of the filing of said application, and is or expects to become bona fide engaged in the business of an insurance agent (as defined in this Act), that he has such moral and financial standing as to make it probable that he can carry on such an agency without detriment to the public, that he expects bona fide to solicit and serve the public generally and not to procure the license chiefly for the purpose of getting a rebate or commission on insurance written for himself or his family or some partnership or corporation in which he is interested or with which he is connected, and that he has such knowledge of the business and of the law and practices governing and relating to the same as will enable him to carry on the business in a competent manner and without detriment to the public.

"'56-508 (a). Examination by Commissioner. After receipt of application for such agent's license in due form (and if said application is from a first-time applicant for license, it shall be accompanied by an examination fee of $10.00, to be paid by agent), it shall be the duty of the Insurance Commissioner, or his deputy or any person he may designate to represent him, within a reasonable time and in a place reasonably accessible to the applicant, in order to determine the trustworthiness and competency of an applicant, for a license, to subject each first-time applicant for license, and, if he deems necessary, any applicant for renewal of license, to a personal written examination as to his or her competency to act as such agent in the community which he intends to serve. When it is shown from such application and examination that the applicant is intending in good faith to act as an insurance agent or solicitor and to be principally engaged in the insurance business and is of good character, is now a bona fide resident of the State of Georgia, and in good faith intends to remain as such resident for a period of twelve (12) months or more from the date of the filing of said application, and is or expects to become bona fide engaged in the business of an in-

surance agent (as defined in this Act), that he has such moral and financial standing as to make it probable that he can carry on such an agency without detriment to the public, that he expects bona fide to solicit and serve the public generally and not to procure the license chiefly for the purpose of getting a rebate or commission on insurance written for himself or his family or some partnership or corporation in which he is interested or with which he is connected, and that he has such knowledge of the business and of the law and practices governing and relating to the same as will enable him to carry on the business in a competent manner and without detriment to the public, and is worthy of a license, the Insurance Commissioner shall issue to the applicant a license to transact business in this State as an insurance agent or solicitor. Such license shall expire annually on the first day of March unless sooner revoked for cause by the Insurance Commissioner: Provided, that no agent holding a license at the time of the enactment of this Act shall be deemed a first-time applicant.

"'56-508 (b). Who may be appointed as agent. Any company lawfully authorized to transact business in this State may contract with and appoint as its representative in this State any person as its agent who holds an unexpired agent's license issued under the provisions of this Act, by filing with the Insurance Commissioner a certificate showing the name and address of such appointee and by paying such fee as is provided by law.

"'56-508 (c). Temporary license. In the event of the death or the inability further to act, of an agent holding a certificate of authority from any company, where no other agent in the co-partnership, association or corporation is authorized to represent such company, the Insurance Commissioner may issue a temporary license to another person enabling such other person to represent any such company upon an application being made in conformity with Section 2 and the additional information required by this section. Such temporary license shall continue only until the license is afforded an opportunity of taking the examination provided in Section 2 above.

"'56-508 (d) Renewal of licenses. Renewal of all expiring licenses shall be upon application in writing, subject to the conditions of examination of such applicants as set forth in Section 2 for renewal of license, and upon payment of the annual insurance agent's occupational tax. Provided that should the Commissioner require an examination for renewal of such license, no examination fee shall be required.

"'56-508 (e). Agency associations. Associations may be formed or maintained by all or any class of the regularly licensed insurance agents referred to in this Act for the purpose of maintaining the ethics of the profession and forwarding their aims. It shall be lawful for such associations to make and enforce by-laws deemed by such associations needful to carry out such purposes.'

"Sec. 2. Be it further enacted, that there shall be added to the said chapter 56-5, relating to 'Agents and Solicitors,' of title 56—Insurance, of the Georgia Code, after Section 56-522 thereof the following new sections:

"'(1) No corporation, individual, firm or association not licensed in Georgia to transact the business of a fire and casualty insurance, or the writing and issue of fidelity and surety bonds, shall so engage in such business within the limits of this State; nor shall any person act as agent for any company, individual, firm, or association engaged in the writing of such business, unless such person has himself first received a license from the Insurance Department to represent a company duly authorized in the State. Penalty for the violation of this provision on the part of the corporation, individual, firm or association illegally engaged in the writing of business in this State as herein provided shall be $1,000 for the first offense and $2,000 for each additional offense. It shall be deemed a misdemeanor for any person to act as agent for any such company without such person having first received a license as provided herein.

"'(2) No individual, firm, corporation or association residing or doing business in this State shall accept a policy

of fire or casualty insurance, or fidelity or surety bond issued by a non-admitted company, individual, firm or association in violation of the preceding section, unless such individual, firm, corporation, or association shall immediately report the fact to the Insurance Commissioner, giving the name of the company issuing the policy or contract, stating its amount and the premium paid thereon, and shall thereupon pay to the Insurance Commissioner the license fee properly chargeable against such company if it were admitted to the State, and the premium tax chargeable under the General Tax Act upon the amount of premium so paid. Failure so to report and pay the license fee and premium tax herein mentioned shall subject such individual, firm, corporation or association to a penalty of 10% of any such sum as may be paid as indemnity by such insurer to the assured in the event of a loss. Such penalty may be collected upon the establishment of such fact in a civil suit by any informer in any court having jurisdiction thereof, one-half of the amount of such recovery to go to the informer and the other half to be paid to the Insurance Commissioner to be placed by him in the general funds of the State; or the same may likewise be recovered upon the establishment of such fact in a civil suit brought in the name of the State of Georgia by the solicitor-general of the circuit where such act may have been done, in which event the solicitor-general shall be paid 10% of the amount received.

"'(3) If any licensed company shall violate any of the provisions of this Act as hereby amended, the Insurance Commissioner may, upon his own motion, and shall upon sworn information in writing signed by a citizen of this State and filed with the Commissioner, make due inquiry, in the form and manner hereinafter provided, into any such alleged violation of the provisions of this Act, and upon proof being presented, the sufficiency of which shall be determined by him, the Commissioner shall assess a penalty of one hundred ($100.00) dollars for each offense. No penalty as herein provided shall be imposed upon such alleged violator until a written copy of such charges, together with a citation, requiring appearance before the Insurance Commissioner at the

State Capitol on a day certain to be fixed by the Insurance Commissioner, at a time not less than twenty (20) days after the service of such citation and copy of charges, then and there to show cause in writing why such penalties should not be inflicted. Service of such citation and copy of charges shall be made upon its Attorney-in-Fact designated to acknowledge or receive service in the manner provided by law for such service.

" 'For the purpose of such inquiry the Insurance Commissioner is hereby empowered to summon witnesses, so as to enable him to make a determination of the merits, provided that any order of the Insurance Commissioner suspending or revoking any license shall be subject to an appeal on the same terms and in the same manner and form as is now provided by law for appeals from the decisions of the Courts of Ordinary of this State.

" '(4) Any penalty or penalties herein provided for shall be in addition to and cumulative to any other penalty or penalties heretofore provided for by law.'

"Sec. 3. Be it further enacted, that it is specifically declared to be the intention of the General Assembly to enact each and every one of the sections herein contained separately and independently of each other; and therefore, in the event that any section of this Act shall be declared to be void or unconstitutional by any court of competent jurisdiction, such decision shall not affect the remainder of this Act or any other section thereof.

"Sec. 4. Be it further enacted, that all laws or parts of laws in conflict with any of the foregoing provisions of this Act shall be, and the same are, hereby repealed."

Approved March 28, 1935.